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In The Supreme Court of the United States

October Term, 1990

STATE OF MISSISSIPPI
PETITIONER

VERSUS

EARL WESLEY BERRY
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a capital defendant must be allowed to have the sentencing jury consider as a constitutionally required mitigating factor the defendant's status as a habitual offender and resulting ineligibility for parole if given a life sentence when that jury is determining the appropriate punishment for a conviction of capital murder?

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NO. 90-____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STATE OF MISSISSIPPI,
Petitioner

versus

EARL WESLEY BERRY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

INTRODUCTION

Petitioner respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of Mississippi to review its decision in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court was rendered on December 19, 1990, in Berry v. State, ____ So.2d ____, No. 89-DP-199 (Miss. 1990) (Not yet

reported). A copy of the opinion of the Mississippi Supreme Court is included herewith as Appendix A.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner submits that this case involves the application of the Eighth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

A. Procedural History.

The case at bar was originally prosecuted in the Circuit Court, First Judicial District, of Chickasaw County, Mississippi. Earl Wesley Berry was indicted by the grand jury of that court

during its March 1988 Term for the crime of capital murder of Mary Bounds while engaged in the commission of the crime of kidnapping and as being an habitual criminal.

A jury was impaneled and Berry was tried on the indictment and found guilty of capital murder. After hearing evidence in aggravation and mitigation of sentence, the jury retired to consider whether Berry would be sentenced to death or life imprisonment. Upon due consideration the jury returned a sentence of death in proper form sentencing respondent to death.[1]

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[1]We, the Jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:

That the Defendant, Earl Berry, actually killed Mary Bounds;

We, the jury, unanimously find that the aggravating circumstances of:

After the sentence of death was imposed, the trial court conducted a hearing on the question of whether Berry would be sentenced as an habitual offender. At the conclusion of this hearing respondent was adjudged to be an habitual offender. In accordance with the verdict, the trial court then set a date for execution by lethal injection.

Respondent appealed the conviction and sentence to the Mississippi Supreme

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1. The Defendant, Earl Berry, was previously convicted of a felony involving the use or threat of violence to the person.

2. The capital offense was committed while the Defendant was engaged in the commission of the crime of kidnapping.

3. The capital offense was especially heinous, atrocious or cruel.

are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find that the Defendant, Earl Berry, should suffer death.

Docket Entry Vol. at 138-39.

Court. On December 19, 1990, the court below rendered its opinion in this case. The conviction was affirmed by a unanimous court.[2] The sentence of death was reversed and the cause remanded for a new sentencing hearing by a divided court. Berry v. State, ___ So.2d ___, No. 89-DP-199 (December 19, 1990) (Not yet reported).

From this ruling, the State of Mississippi petitions for a Writ of Certiorari to review the decision of the State's Supreme Court in this cause.

B. Statement of Facts.

Mary Bounds was last seen on Sunday, November 19, 1987, leaving choir practice at the Baptist Church in Houston, Mississippi. When she was not seen by

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[2]Only eight of the nine justices of the Mississippi Supreme Court participated in this case. Justice Armis Eugene Hawkins took no part in the decision.

family members on Monday, she was reported missing and an investigation ensued. Police found her car in Houston near the Baptist Church. Blood was spattered around the driver's door of the car and Mary Bounds' earrings were found nearby. Authorities were subsequently directed to a place where a pair of woman's shoes had been found by the side of the road. A search of the surrounding area led to the discovery of Mary Bounds' body.

The details of the murder, taken from Berry's own statements, were described by the court below.

> Earl Berry, after leaving a friend's apartment, drove through Houston, Mississippi, at approximately 7:00 p.m., Sunday, November 29, 1987. He saw Mary Bounds near the Baptist Church, and approached her. As Berry reached for her, she screamed, he hit her and forced her into his car, after which he left town.

> The first time Berry stopped, he took Mary Bounds into the woods, lifted her over a fence, and ordered her to lie down, intent on raping her. For reasons unknown, he did not actually commit the rape, but took his victim back to his car, telling her they would return to town. Once in the car, Berry drove, not into town, but south and turned off once again into another wooded area. Mary Bounds begged, for what, Berry could not say. Berry beat her with his fist and forearm, after which he carried her over a fence and deeper into the woods. At one point she was forced to the ground and he lay over her as a car approached. He carried her deeper into the woods, where he left her.
>
> Berry drove south, eventually arriving at his grandmother's house, disposing of a mismatched pair of tennis shoes he was wearing on the way. On arrival he burned his bloodied clothes, then cleaned the blood from his car with a towel which he threw into the pond near the house.

Slip Op. at 2.

The ensuing investigation turned up the towel and the mismatched tennis shoes, the latter found with Berry's assistance.

The autopsy revealed that Mary Bounds' body bore wounds consistent with a beating and that she had died of head injuries from the blows.

REASONS FOR GRANTING THE WRIT

The ruling of the Mississippi Supreme Court is contrary to the precedent of this Court in its interpretation of the constitutional requirements regarding mitigating circumstances in death penalty cases. The ruling below also creates a conflict with the precedent of the United States Court of Appeals for the Fifth Circuit regarding the issue of parole eligibility as a constitutional mitigating factor.

ARGUMENT

A capital defendant is not entitled to have the sentencing jury consider as a constitutionally required mitigating factor the defendant's status as a habitual offender and resulting ineligibility for parole if given a life sentence when that jury is determining the appropriate punishment for a conviction of capital murder.

A brief review of the Mississippi court's historical treatment of this issue sets the stage for the resolution of this conflict. James Mhoon was convicted of capital murder and sentenced to death. Indicted has an habitual offender pursuant to Section 99-19-81, Miss. Code Ann. (Supp.1982), he asked on direct appeal whether it was error to prevent the jury from being told that if they returned a life sentence it would be life without parole. Mhoon v. State, 464 So.2d 77, 82

(Miss.1985). The Mississippi Supreme Court answered.

> Appellant's argument overlooks a fundamental point. There was no way of knowing that Mhoon would be sentenced as a recidivist at the time in question.
>
> Under the procedures inaugurated by our recidivism statutes, sections 99-19-81 and -83, a separate post-conviction hearing is required. Rule 6.04, Unif.Crim.R. of Cir.Ct. Practice; Adams v. State, 410 So.2d 1332, 1334 (Miss.1982). At such hearings the state is required to prove that the various statutory requisites have been met and that the defendant is in law eligible for sentencing as a recidivist. As the reports of our decisions reflect, the state does not always prevail on this point. See, e.g., McLamb v. State, 456 So.2d 743 (Miss.1984); Debussi v. State, 453 So.2d 1030 (Miss.1984).
>
> Whether Mhoon would ultimately be sentenced as a recidivist was a matter legally just as speculative as whether he might some day be paroled. We forebade [sic] argument about possible parole in Williams v. State, 445 So.2d 798, 812-813 (Miss.1984). We hold here that

> the trial judge correctly prohibited defense counsel from presenting testimony speculatively as to whether Mhoon could be sentenced as a recidivist to life without parole.

464 So.2d at 82-83.

Plainly and simply the Mississippi Supreme Court, relying solely on Mississippi law and procedure, prohibited trial courts from instructing the jury on the possible sentencing of a defendant as a recidivist to life without parole. It was clear to all who read Mhoon v. State that Mississippi law forbid this speculative issue to enter a capital jury's sentencing considerations.

We turn to the next Mississippi case which directly considered the question, Turner v. State, 573 So.2d 657 (Miss.1990) (No. 03-DP-82, not yet reported). This consideration, however, lead to the opposite conclusion by the lower court and

did so by unquestionably relying on federal constitutional grounds. Or, as the court in Turner stated:

> For the following reasons, this Court now holds that the jury should have been informed of Turner's ineligibility for parole. This conclusion is based, for the most part, upon constitutional principles of due process and fundamental fairness. These principles have been intrinsic themes in numerous decisions of the United States Supreme Court.
>
> For example, in one case, the Supreme Court deemed as "wise" Georgia's choice "not to impose unnecessary restrictions on the evidence that can be offered at [sentencing] hearing[s] and to approve open and far-ranging argument. Greg v. Georgia, 428 U.S. 158, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859, 891 (1976) (citing Brown v. State, 220 S.E.2d 922 (1975) (emphasis added). The Court added: "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Id. at 204, 96 S.Ct. at 2939, 49 L.Ed.2d at 891-92 (emphasis added). Almost immediately after Gregg was decided, the Supreme Court emphasized that it

is "essential that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929, 941 (1976) (emphasis added). In another case, the Court reiterated that under the Eighth Amendment, the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171, 1178-79 (1983), quoted in Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231, 239 (1985). And more recently, the Court held that the federal Constitution "limits" states' "ability" to "narrow" a jury's consideration of any relevant evidence that could "cause it to decline to impose the death sentence." McClesky [sic] v. Kemp, 481 U.S. 279, 304, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262, 286 (1987) (emphasis in original).

. . . . . .

This Court simply cannot accept as logical or justifiable the procedure by which many, if not most or all, capital-murder trials have thus far been

> conducted. The procedure as it stands leaves a defendant's eligibility for parole uncertain and "narrows" a jury's consideration of clearly relevant information that could "cause it to decline to impose the death sentence." McClesky [sic], 481 U.S. at 304, 107 S.Ct. at 1773, 95 L.Ed.2d at 286 (emphasis omitted).
>
> . . . . . .
>
> Providing juries with such non-speculative information would be compliant with the dictates of logic and constitutional principles of due process and fundamental fairness. In other words, the procedure would meet the "essential" requirement that juries have before them "all possible relevant information about the individual defendant whose fate it must determine." Jurek, 428 U.S. at 276, 96 S.Ct. at 2958, 49 L.Ed.2d at 941 (emphasis added).

Slip Op. at 26-30 (emphasis the court's and emphasis added).

One week after the Turner v. State opinion was handed down, the Mississippi Supreme Court issued its direct appeal opinion in the case at bar. The language of the court resolves any doubts regarding

the legal basis for the lower court's reversal on this issue - federal constitutional grounds were specifically adopted as the foundation of the court's holding.

> We find the reasoning of the Supreme Court of New Mexico in State v. Henderson, 109 N.M. 655, 789 P.2d 603, 606-607 (1990) on this issue to be compelling, and hereby adopt the following:
>
> We base our decision herein on the fundamental fairness, due process and eighth amendment rationales implicit in the decision in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), to the effect that "'the jury [must] have before it all possible relevant information about the individual defendant whose fate it must determine,'" id. at 1003, 103 S.Ct. at 3454 (quoting Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976)), and in McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), to the effect that states cannot limit the sentencer's consideration of any relevant circumstance that could "cause it to decline to impose

> the death sentence." Id. at 304, 107 S.Ct. at 1773.

Slip Op. at 21 (emphasis the court's and emphasis added).

As a point of emphasis, the court accompanied its discussion on this issue with citations to the U.S. Const. Amend. VIII, XIV. Slip Op. at 21.[3]

The Mississippi Supreme Court specifically adopted the fundamental fairness, due process and eighth amendment rationales expressed in this Court's decisions in California v. Ramos, 463 U.S.

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[3]Since the Mississippi Supreme Court's decision in Berry v. State, the case of Mackbee v. State, _____ So.2d __ (Miss.1990) (No. 03-DP-89, not yet reported), was decided. In Mackbee, the court below attempts to evade review of this question by stating in a footnote that the federal authorities cited are for illustrative purposes only and that the case is decided under the state constitution. Slip Op. at 38, n. 11. This statement has no application to the case at bar as the case sub judice is clearly based solely on federal constitutional law.

992 (1983) and McCleskey v. Kemp, 481 U.S. 279 (1987), as the foundation for its holding. The Mississippi court's opinion thus raises the question of the validity of its holding in light of these federal constitutional decisions.

We submit the lower court erroneously concluded that California v. Ramos and McCleskey v. Kemp, relying on Jurek v. Texas, 428 U.S. 262 (1976), and therefore the Eighth Amendment require that a capital defendant be allowed to present evidence and argument to his sentencing jury that if that jury returns a sentence of life, it will be served without parole. In so contending, we suggest that the lower court's holding is contrary to the precedents established by this Court regarding the constitutional requirements concerning mitigating circumstances in death penalty cases.

In Ramos this Court considered the constitutionality under the Eighth and Fourteenth Amendments of instructing a capital sentencing jury regarding the Governor's power to commute a sentence of life without possibility of parole. This Court left to the states the prerogative to determine whether juries should be informed of sentencing alternatives such as parole or commutation of a sentence. 463 U.S. at 1013-1014.

Shortly thereafter, the Mississippi Supreme Court set forth its policy in Williams v. State, 445 So.2d 798 (Miss.1984). The court below held:

> A jury should have no concern with the quantum of punishment because it subverts a proper determination of the sentencing issue.
>
> Reference to the possibility of parole should the defendant not be sentenced to die are wholly out of place at the sentencing

phase of a capital murder trial for two additional reasons.

First, such references inevitably have the effect of inviting the jury to second guess the Legislature. The Legislature has declared that persons sentenced to life imprisonment may under certain circumstances become eligible for parole. Mississippi Code Annotated section 47-7-3(1) (Supp. 1982). It is no more proper for the jury to concern itself with the wisdom of that legislative determination than it is for the jury to consider the Legislature's judgment that death in the gas chamber be an authorized punishment for capital murder. Johnson v. State, 416 So.2d 383, 392 (Miss.1982).

Second, parole is not automatic. No person sentenced to life imprisonment has any "right" to parole. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1,11, 99 S.Ct. 2100, 2105, 60 L.Ed.2d 668, 677 (1979); Davis v. State, 429 So.2d 262, 263 (Miss. 1983). Allowing argument or testimony regarding the possibility of the defendant some day being paroled is in effect inviting the jury to speculate how ten years in the future the parole board may

> exercise its legislatively granted discretionary authority. This would introduce into the sentencing proceeding an "arbitrary factor" proscribed by 99-19-105(3)(a).

445 So.2d at 813.

The Mhoon v. State decision followed one year later.

Yet relying on McCleskey and Jurek, the lower court now flies in the face of Ramos and its holding that such sentencing considerations are not constitutionally required and should be left up to state law. That court also counters its own prior holdings. This action was taken based on constitutional grounds which do not exist.

As noted previously, the court below expressly relies on the quotation from McCleskey which dictates that the Constitution limits a state's ability to narrow the jury's discretion to consider

evidence which might cause it "to decline to impose the death sentence." 481 U.S. at 304. Taken in isolation, this quotation can lead to a misleading conclusion on what mitigating evidence is constitutionally required or constitutionally relevant. Read in context with the remainder of this Court's discussion, a different conclusion is reached.

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentencer. "[T]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v Ohio, 438 US, at 604, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26 (plural-

> ity opinion of Burger, C.J.) (emphasis in original; footnote omitted). See Skipper v South Carolina, 476 US 1, 90 L Ed 2d 1, 106 S Ct 1669 (1986). Any exclusion of the "compassionate or mitigating factors stemming from the diverse frailties of humankind" that are relevant to the sentencer's decision would fail to treat all persons as "uniquely individual human beings." Woodson v North Carolina, supra, at 304, 49 L Ed 2d 944, 96 S Ct 2978.

481 U.S. at 304 (emphasis the Court's; footnote omitted).

Thus, relying on the brief McCleskey quote cited in the direct appeal opinion, the Mississippi Supreme Court has held that Berry's parole states is a relevant, constitutionally required mitigating factor of which the jury had to be informed. This holding diametrically opposes the precedent of the United States Court of Appeals for the Fifth Circuit.

In King v. Lynaugh, 850 F.2d 1055 (5th Cir. 1988), cert. denied, 488 U.S.

1019 (1989), the Court of Appeals, sitting en banc, rejected any contention that a capital defendant has a constitutional right to have prospective jurors voir dired on their understanding of parole. Id. at 1059-1061. The Fifth Circuit stated:

> We are further reluctant to require asymmetrical constitutional requirements for voir dire and the jury deliberations because of the Supreme Court's determination that a jury instruction on a capital defendant's eligibility for parole or commutation of sentence does not raise a constitutional issue. California v. RAmos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

850 F.2d at 1061.

See O'Bryan v. Estelle, 714 F.2d 365, 388-389 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984) (no constitutional mandate that a jury be instructed as to the law of parole).

And yet the Mississippi court ignored this federal precedent and, by reading the language of McCleskey and Jurek without the benefit of the context of this Court's entire discussion, has constitutionalized parole eligibility as a mitigating circumstance on which the jury must be instructed. This expansive application of a single phrase from McCleskey goes far beyond the constitutional requirements delineated by this Court.

A capital sentencer may not be precluded from considering "any relevant, mitigating evidence." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982). The phrase "any relevant mitigating evidence" was subsequently discussed by this Court in Franklin v. Lynaugh, 487 U.S. 164 (1988).

> This statement leaves unanswered the question: relevant to what? While Lockett, supra, at 604, 57

> L Ed 973, 98 S Ct 2954, 9 Ohio Ops 3d 26, answers this question at least in part--making it clear that a State cannot take out of the realm of relevant sentencing considerations the questions of the defendant's character," "record," or the "circumstances of the offense"--Lockett does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors.

487 U.S. at 179 (plurality opinion).

In her concurring opinion, Justice O'Connor stated, "[w]e have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death." 487 U.S. at 188.

The question becomes, is a defendant's continual and habitual violation of the law a mitigating factor as defined by this Court? We submit that a defendant's prior "record" is relevant

information from which the sentencer could glean elements of mitigation. However, ineligibility for parole because of status as an habitual offender is not relevant to the inquiry of whether a defendant should be sentenced to death or life imprisonment.

In Gregg v. Georgia, 428 U.S. 153, 198 (1976), this Court recognized the importance of safeguards to prevent arbitrariness and caprice from entering the sentencer's decision-making process. Thus a different question would be presented here if every capital murder defendant in Mississippi faced the alternatives of life without parole or death. However, the penalty for capital murder in Mississippi is either life imprisonment or death. Section 97-3-21, Miss. Code Ann. (Supp.1990). Thus a convicted capital murderer becomes

eligible for parole in ten years. Section 47-7-3, Miss. Code Ann. (Supp.1990). Only when a defendant has prior convictions which qualify him for indictment as an habitual offender under either Section 99-19-81 or Section 99-19-83, Miss. Code Ann. (Supp.1990), is life without parole a sentencing option.

The arbitrary factor which will now enter into the sentencing of capital defendants is reflected by the fact that under Turner v. State and Berry v. State, the lower court still prohibits any mention of parole eligibility in cases where a capital defendant, not indicted as a habitual offender, is eligible for parole.[4] Thus a career criminal will be arbitrarily rewarded because the lower

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[4]This prohibition is clearly pointed out by the dissent of Chief Justice Roy Nobel Lee to the opinion in Turner v. State.

court constitutionalized his status as an habitual offender as a mitigating factor. The lack of a criminal record is clearly a mitigating factor. Yet a capital defendant who cannot qualify as an habitual will be penalized by the lower court's decision here.

A defendant's status as a career criminal is not a mitigating factor much less a constitutionally required mitigating factor. Yet the lower court's reading and application of McCleskey to the case at bar creates a presumption that life is the proper sentence for such a defendant.

We submit that as an habitual criminal, a defendant has no constitutional right to anything more than a neutral decision without preference to life or death. The Mississippi Supreme Court erred when it concluded that

McCleskey and Jurek require a life without parole instruction.

We further submit that Berry was not entitled to have the sentencing jury consider as a constitutionally required mitigating factor his status as a habitual offender and resulting ineligibility for parole if given a life sentence. The removal of the lower court's recently discovered, constitutionally required mitigating factor from the capital sentencing scheme would only remove a new arbitrary factor suddenly injected into Mississippi's scheme by the court below. To eliminate this new arbitrary factor would not violate due process nor result in fundamental unfairness to a capital defendant.

CONCLUSION

For the above and foregoing reasons the decision of the Mississippi Supreme Court reversing the sentence of death in this cause was erroneous. A writ of certiorari should issue and plenary review granted in this case.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

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Charlene R. Pierce
CHARLENE R. PIERCE

CERTIFICATE OF SERVICE

I, Charlene R. Pierce, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Petition for Writ of Certiorari to the Supreme Court of Mississippi** to the following:

Honorable David O. Bell
Post Office Box 1504
Oxford, Mississippi 38655

This the 19th day of March, 1991.

Charlene R. Pierce

CHARLENE R. PIERCE

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-DP-199

EARL WESLEY BERRY

v.

STATE OF MISSISSIPPPI

EN BANC

BLASS, JUSTICE, FOR THE COURT:

On March 1, 1988, the grand jury of Chickasaw county indicted Earl Wesley Berry for the murder and kidnapping of Mary Bounds, and as an habitual criminal. Miss. Code Ann. § 97-3-19 (2) (e) (Supp. 1990); Miss. Code Ann.§ 97-19-81 (Supp. 1990). In a bifurcated trial, Berry was found guilty of capital murder and sentenced to death.

From the judgment, sentence, and denial of post-trial motions, Berry appeals,

citing twenty-one errors. Finding no merit in the errors raised as to the guilt phase, we affirm the conviction for murder and kidnapping. We vacate the sentence of death and remand for a new sentencing trial.

I.

Mary Bounds was reported missing around midnight, Sunday, November 29, 1987. Authorities located her automobile in Houston, near the Baptist Church. Blood was splattered around the driver's door of the car, and Mary Bounds' earrings were found near the car Tuesday morning. Cecil Woodard, Jr. found a pair of woman's shoes by the side of a road Monday morning. On learning that a woman was missing, he directed authorities to the place where he found them. Nearby, authorities discovered Mary Bounds' body.

We know details of the murder only from Earl Berry's own statements, corroborated by the physical evidence. Earl Berry, after leaving a friend's apartment, drove through Houston, Mississippi, at approximately 7:00 p.m., Sunday, November 29, 1987. He saw Mary Bounds near the Baptist Church, and approached her. As Berry reached for her, she screamed, he hit her and forced her into his car, after which he left town.

The first time Berry stopped, he took Mary Bounds into the woods, lifted her over a fence, and ordered her to lie down, intent on raping her. For reasons unknown, he did not actually commit the rape, but took his victim back to his car, telling her they would return to town. Once in the car, Berry drove, not into town, but south and turned off once again into another wooded area. Mary Bounds

begged, for what, Berry could not say. Berry beat her with his fist and forearm, after which he carried her over a fence and deeper into the woods. At one point she was forced to the ground and he lay over her as a car approached. He carried her deeper into the woods, where he left her.

Berry drove south, eventually arriving at his grandmother's house, disposing of a mismatched pair of tennis shoes he was wearing on the way. On arrival he burned his bloodied clothes, then cleaned the blood from his car with a towel which he threw into the pond near the house.

A blue pajama top and dish towel were found in the pond behind Berry's house. Berry's knuckles were skinned when he was arrested. The mismatched tennis shoes were located with Berry's assistance. Mary Bounds' body bore wounds consistent

with a beating, and her legs were badly scratched. She died of head injuries from blows.

GUILT PHASE

II.

Berry filed a motion to suppress all statements obtained from him by government agents. A hearing was held on October 18 and 19, 1988, on the motion to suppress. The motion was overruled on a finding that, "[T]he statement was freely and voluntarily given and that the constitutional requirements were met."

Findings by a trial judge that a confession was admissible are findings of fact, treated as any other findings of fact. As long as the trial judge applies the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error, or is contrary to

the overwhelming weight of the evidence. David v. State, 551 So. 2d 165, 169 (Miss. 1989); Frost v. State, 483 So. 2d 1345, 1350 (Miss. 1986).

We examine the proceedings in light of this scope of review. The state initially presented the testimony of Billy Gore, investigator with the Mississippi State Highway Patrol. After Earl Berry testified, the state called Sheriff Bill Middleton, Sheriff of Webster County, and Jimmy Edwards, investigator with the Highway Patrol, whose recollection of the arrest and interrogation was essentially the same as Gore's.

Gore, accompanied by Sheriff Middleton, arrived at Berry's home at approximately 7:00 a.m., Sunday, December 6, 1987. Berry was advised of his Miranda rights and questioned about his whereabouts the previous weekend. Berry stated that he

had been home all weekend. On being told that he had been seen in Houston in a white car, Berry denied having been in that car, but indicated that he had been in Houston in his own vehicle. Berry admitted having burned some clothing on the previous Sunday night, and told a story of having assisted a hunter drag a deer from the woods. The officers obtained permission to search the automobile belonging to Berry's grandmother. A wrecker was called to tow the car. When the wrecker arrived, Berry was taken to the Jail in Houston, and logged in at 9:40 a.m.

Billy Gore testified that the following occurred that afternoon between 4:30 and 5:00 p.m:

> Jimmy Edwards and I went back to the jail to attempt to talk to him again, and I went back to ask him if he would talk to us, and he said, "If I can make a phone call, I might talk to you." I

said, "Okay. Who do you want to call?" He said, "A lawyer." I said, "Who is it?" He said, "Jim Waide. He's a fellow that helped me one time and he said if I ever needed any help, just call him." At that time, Roy Hill, a trustee, came into the hall with meals and I said, "We'll let him serve the supper and then I'll come and get you out." After supper, I got him out and brought him up to the Sheriff's office. . . . I said he could use that phone right there.

* * *

Q.You say you let him out to make a phone call.

A.Right.

Q.Tell us what happened then.

A.He said, "I don't want to call." I said, "Well, are you still willing to talk to us?" He said, "Yes." I said, "Well, before we go any further, we got people pumping the pond out down there. Are your shoes or anything in there that we need to be looking for?" He said, "No." So I went and radioed the units down there and told them they could quit pumping the pond. And then I went back in the room where Jimmy Edwards was sitting in there with him. *** I went over his right [Miranda rights] again. I really got surprised. When he asked to call an attorney, I told Jimmy Edwards, "He won't never talk to us. The attorney is going to tell him not to say anything." But then he just, out of the wild blue, went to telling about it. We didn't have to go into any questioning.

Berry then confessed to the murder of Mary Bounds. Gore composed a statement based on the interrogation. He read it back to Berry, who requested that two inclusions be made, one that he had been advised of his rights, and another referring to his brother's homosexuality, after which Berry signed the statement voluntarily.

Earl Berry's description of the arrest was quite different from Gore's account. According to Berry, he was never advised of his rights, but requested counsel immediately on arrest at 7:00 a.m., and several times thereafter. Berry denied having requested that Gore include the statement that Berry had been advised of his rights, but did agree that he had requested the statement referring to his brother's homosexuality.

A.

Arguably, when Berry indicated he wished to contact an attorney, he invoked his fifth amendment right to counsel. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Smith v. Illinois, 469 U.S. 91, 98-99, 105 S.Ct. 490, 83 L. Ed. 2d 488 (1984). On being taken to the office and given the opportunity to call, however, Berry indicated that he no longer wished to contact an attorney when he said, "I don't want to call." Berry had said earlier that he might talk to the officers if he could first make a phone call. Gore, seeking clarification of Berry's position, asked, "Well, are you still willing to talk to us?" to which Berry replied, "Yes," indicating that he was willing to enter

into a discussion of the crime. U.S. v. Velasquez, 885 F.2d 1076 (3rd Cir. 1989). Having withdrawn his request to call a lawyer, and having stated that he was willing to talk to the officers, Berry was then asked only the question concerning the pond, and was once again advised of his Miranda rights, after which he confessed. We cannot find that the trial judge was manifestly wrong in his determination that the statement was freely and voluntarily given and we find, further, that Berry knowingly and intelligently waived the right to counsel, if he had previously invoked it. Smith, 469 U.S. at 95, 105 S.Ct. at 492-93, 83 L. Ed. 2d at 493. It is not the duty of the officers and prosecutors, nor the function of the courts, to insist that a person accused of a crime actually confer with a lawyer before talking about the crime, nor

is there any prescribed procedure or form to be followed in the waiver of the right to such assistance.

B.

Berry cites several cases in support of his position, none of which dictates the outcome in this case.

In Smith, 469 U.S. at 91, 98-99, 105 S. Ct. at 494-95, 83 L. Ed. 2d at 495-96 the accused, in response to questions concerning his understanding of the Miranda rights, indicated that he wanted to consult with a lawyer. Rather than terminate all interrogation, police officers continued to read the rights during which, in response to "Do you wish to talk to me at this time without a lawyer being present?" Defendant responded "Yeah and no, uh, I don't know what's what, really." Id. at 93, 105 S. Ct. at 491-92, 83 L. Ed. 2d at 492. In finding

that Smith had requested assistance of counsel, the court re-examined cases dealing with the accused's assertion of right to counsel. The accused, once he expressed his desire to deal with police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless he validly waives the earlier request. This "rigid" prophylactic rule embodies two distinct considerations. First, did the accused actually invoke his right to counsel. Second, if the right was invoked, further questioning is permissible only on a finding that the accused (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Id. at 95, 105 S. Ct. at 492-93, 83 L. Ed. 2d at 493 (citations omitted).

Applying the test in Smith, and using only Gore's testimony, Berry indicated that he was considering being represented by counsel when he said he wanted make a phone call to a lawyer. He did not ask for a lawyer, nor indicate any desire to deal with the police only through counsel. According to Gore all questioning ceased. Whether Berry's initial request to telephone Jim Waide is characterized as equivocal or unequivocal, all questioning ceased immediately. Berry was given the opportunity to telephone an attorney before further questioning. Berry, without any overreaching, pressure, or persuasion by the police, made the decision not to call. Gore's question clarified this waiver, after which Berry was asked only one question, about the pond. Berry was then again advised of his Miranda rights and made the confession.

Edwards indicates that after an accused has expressed a desire to deal with the authorities only through counsel, he may not be further questioned unless he himself initiates the discussion. Oregon v. Bradshaw, 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L. Ed. 2d 405, 412-13 (1983) discusses "initiation." In Bradshaw, the accused, after requesting an attorney, asked, "Well, what is going to happen to me now?" The U.S. Supreme Court stated that this was an "initiation" but that inquiries relating to routine incidents of the custodial relation would not "initiate" a new inquiry in the sense in which the word was used in Edwards. The Court indicated that it did not desire to build up a body of case law around the word "initiate." In the case before us, we find that Berry's statement to the officers in the sheriff's office, that he

no longer wished to call a lawyer, either re-opened the old conversation or initiated a new one. Therefore, the recent U.S. Supreme Court decision, Minnick v. Mississippi, 59 U.S.L.W. 4037 (1990), is inapplicable.

Berry contends that, assuming any question whatsoever was permitted after his unequivocal request for a lawyer, the only permissible questions were those intended to clarify the request, citing Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). In Thompson the suspect was misled by interrogating officers into abandoning his equivocal request for counsel. This was not the case here. The Fifth Circuit noted that the suspect had asked for counsel, but the interrogating officer explained that an attorney would probably advise him to say nothing depriving Thompson of his opportunity to

tell his story. After Berry indicated that he did not wish to call a lawyer, Gore's question, "Well are you still willing to talk to us?" is analogous to a clarification of the request for counsel. In this case, the officer was attempting to ascertain whether Berry wished to continue the interrogation without advice of counsel. Without any "persuasion or presumption", or being misled or deceived in any way, Berry voluntarily replied "Yes."

This case is unlike United States v. Cherry, 733 F. 2d 1124 (5th Cir. 1984), in that Berry was clearly given the opportunity to telephone an attorney, and chose not to do so. In Cherry, FBI agents continued to question the suspect about the murder after he had equivocally requested an attorney failing to clarify whether he wanted to resume interrogation

without counsel. Cherry, unlike Berry, had not indicated in any manner that he had decided to dispense with legal advice before giving a statement. Cherry, 733 F.2d at 1131.

United States v. Fouche, 776 F. 2d 1398, 1405 (9th Cir. 1985) adopts the Fifth Circuit's approach to a suspect's equivocal assertion of counsel, articulated in Cherry, and Thompson. Fouche indicated that he desired assistance of an attorney, and wanted to telephone his wife. After speaking with her, Fouche was advised of his Miranda rights, and asked if he wanted to make a statement, after which he confessed. The Fouche Court remanded for a finding of whether the interrogators had clarified Fouche's equivocal request for counsel. In the case sub judice, on Berry's request to telephone counsel, he was directed to a

telephone, which he declined to use. Officer Gore's question clarified this failure to call, only after Berry volunteered that he did not wish to make the call.

Owen v. State, 849 F.2d 536, 539 (11th Cir. 1988), is also distinguishable from the case before us. In Owen the circumstances surrounding defendant's confession were examined on a petition for habeas corpus. Owen, while being advised of his rights, interrupted the arresting officer with a statement that he would let them appoint counsel. On completion of the reading of the Miranda warnings, Owen refused to sign the waiver of rights form. Immediately thereafter, Owen confessed. In finding that Owen's request for counsel was not honored, the court cites Justice Rehnquist's dissent in Smith, 469 U.S. at 104, 105 S. Ct. at 497, 83 L. Ed. 2d at

499, explaining the procedure to be followed when a suspect requests counsel while being informed of his rights. The police should complete the reading of the suspect's rights, then ask him to state clearly what he elects to do. If the suspect indicates that he wishes to remain silent the interrogation must cease. Owen, 849 F.2d at 539. Clearly, the officers in this case honored Berry's request for counsel, as expeditiously as possible. Immediately after Berry finished his meal, he was provided a telephone with which to contact an attorney. Berry chose not to do so, then clearly indicated that he was willing to continue the interrogation without aid of counsel.

In People v. Hammock, 121 Ill. App. 3d 874, 460 N.E. 2d 378 (1984), police arrested the defendant late Friday night on a speeding charge, and questioned him

Sunday about a Friday afternoon homicide. In response to Miranda warnings, Hammock indicated he could obtain a lawyer on Monday. Questioning ceased for a short time. On resumption of questioning by the police, Hammock agreed to give a statement after which the assistant state's attorney asked Hammock if he wanted to see his lawyer first. Hammock replied negatively then confessed. This confession was found to be inadmissible because the police, not Hammock, had initiated the interrogation. Hammock, 460 N.E.2d at 381. That is not the case here. In this case, Berry initiated when he indicated he no longer wished to telephone his attorney. One cannot halt an inquiry by first indicating a desire to call a lawyer, then declining to do so when offered the opportunity.

Bryant v. State, 49 Md. App. 272, 431 A.2d 714 (1981), was a case in which

defendant requested a lawyer, the interrogating officer called a public defender but was told all defenders were out, after which the officer indicated that co-defendants were making statements against the defendant, after which he confessed. The appeals court reversed stating that the officer's conduct was an attempt to have defendant renounce his request "because the battle was lost anyway." The court noted, "It is precisely that type of 'persuasion,' duress, coercion, or intimidation that is forbidden by Miranda and Edwards." No elements of persuasion, duress, coercion, or intimidation are evident in the case sub judice.

Here, as in Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987) the purpose of Miranda is to assure that an individual's right to

choose between speech and silence would not be served by suppression of the confession, in the absence of police overreaching. Griffin, 823 F.2d at 863.

Kirkland v. State, 559 So.2d 1046 (Miss. 1990) was a case in which the accused, on being arraigned in justice court, requested court appointed counsel. An investigator, despite hearing this request, questioned Kirkland immediately after the accused left the courtroom eliciting an admission. In reversing, this Court found no intelligent, knowing waiver of the right to counsel, simply from the reading of the Miranda warnings. Kirkland is not controlling in this case. We find that Berry specifically waived his right to counsel when he decided not to call an attorney, and in response to Gore's question, made it specifically clear by a positive statement that no, he

did not desire an attorney to advise him before responding to any more questions about the crime.

We affirm the lower court, finding that the state established each fact which is prerequisite to the admissibility of the confession. Kirkland, 559 So. 2d at 1047.

III.

Berry moved for change of venue prior to trial, raising a rebuttable presumption that he could not obtain a fair trial in Chickasaw County. The trial court is to consider pre-trial publicity in determining the ability of jurors to impartially consider the evidence at trial. Elements which, when present, serve as an indicator to the trial court that the presumption raised is irrebuttable are set out in White v. State, 495 So. 2d 1346, 1349 (Miss. 1986). The presumption of prejudice may

be rebutted by the state's demonstration that an impartial jury was actually impaneled in the appellant's case. Harris v. State, 537 So. 2d 1325, 1328-29 (Miss. 1989). The decision to deny a change of venue is vested in the sound discretion of the trial court. Lutes v.State, 517 So. 2d 541 (Miss. 1987).

Berry's motion for change of venue was primarily based on the extensive publicity prior to trial, making the selection of an impartial jury unlikely. Evidence otherwise inadmissible was contained in the published reports of the crime and the victim was a prominent person in Chickasaw County. A hearing was held on these motions on September 2, 1988. The state presented eleven witnesses; defense presented three. Witnesses for the prosecution testified that in their opinions Berry could receive a fair trial

in Chickasaw County. All testified that they were familiar with the county and its residents and there was no prejudice against Berry.

Defendant's first witness, Kenny Hobbensell, publisher of the Times Post, testified that he wrote the story of the murder and arrest of Berry. The story included references to Berry's prior police record and the fact that Berry had served a prison sentence at Parchman. The Times Post had a circulation of 8,600, approximately 70% of which is in Chickasaw County. On cross-examination, Hobbensell testified that he felt the publicity had not so saturated the community that Berry could not receive a fair trial. The two other witnesses testifying that Berry could not obtain a fair trial were related to Berry by marriage. Neither testified

to familiarity with the county and its residents.

In denying the motion for change of venue, the court found that no evidence was presented by the defense which would warrant a change of venue.

We find no abuse of discretion in this ruling. Neither did the court abuse its discretion in denying a county wide venire.

IV.

Berry argues that the failure of the trial court to remove six jurors for cause deprived him of a fair trial, citing Mhoon v. State, 464 So. 2d 77 (Miss. 1985); Rush v. State, 238 Ark. 149, 379 S.W.2d 29, 32 (1964) (juror must be excused who has formed an opinion that would take evidence to remove even if he will listen to the evidence); and State v. Bennett, 382

S.E.2d 322 (W. Va. 1989) (prospective juror who knew defendant's children and victim and had heard rumors about defendant should have been excused for cause; prospective juror whose sister-in-law was secretary to the prosecutor should have been excluded even though she said she could be fair; trial judge admitted doubt as to whether juror should be permitted on jury).

Only one of the six actually served on the jury, Hazel O'Barr. She was a member of the original tender, and was not challenged at a time when defense had 12 peremptory challenges.

Denial of challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. Rush v. State, 278 So. 2d 456, 458 (Miss. 1973). This threshold test is

applicable in a capital murder case. Billiot v. State, 454 So. 2d 445, 457 (Miss. 1984). A prerequisite to a claim that the trial court erroneously forced a defendant to accept an incompetent juror is exhaustion of peremptory challenges. Chisolm v. State, 529 So. 2d 635 (Miss. 1988). The standard used in examining the conduct of the voir dire is abuse of discretion. Billiot, 454 So. 2d at 457.

Defense counsel accepted O'Barr. Peremptory challenges were exercised to exclude Holliman and Bennet. Chrestman, Davis, and Simpson were not reached. At the completion of the selection process defense still had one challenge left as well as an alternate challenge. In addition defense counsel never raised any objection to the other named prospective jurors, who defense, now contends should have been excused for cause.

We find this assignment without merit.

V.

Berry contends that the prosecutor improperly vouched for the credibility of his witness by placing the credibility of the government behind the witness, in violation of case law and Miss. Rules of Professional Conduct Rule 3.3.

Procedurally, Berry made no contemporaneous objection and is barred from raising this issue. Cole v. State, 525 So. 2d 365, 369 (Miss. 1987).

Substantively, broad latitude is afforded the attorneys in closing argument, and the prosecutor did not exceed the limits of argument in this case. The remarks complained of relate to an issue raised by the defense on cross-examination of Officer Gore and the direct

examination of Berry. Gray v. State, 351 So. 2d 1342, 1346-47 (Miss. 1977); Nelms & Blum Co. v. Fink, 159 Miss. 372, 282-83, 131 So. 817, 820-21 (1930).

Additionally, the trial court was not asked to admonish the jury regarding the allegedly inappropriate comments, and cautionary instructions were given indicating that the testimony of a police officer is entitled to no special or exclusive sanctity.

This assignment is without merit.

VI.

Eleven photographs and slides of the victim were entered into evidence over the objection of the defendant. Berry argues that the probative value of these photos is outweighed by their prejudicial effect. McNeal v. State, 551 So. 2d 151 (Miss.

1989); Kniep v. State, 525 So. 2d 385, 388 (Miss. 1988); Miss. R. Evid. 403.

Admissibility of photographs rests within the sound discretion of the trial judge. Griffin v. State, 557 So. 2d 542, 550 (Miss. 1990). We find this assignment is without merit. Having viewed the pictures, we find their probative value was not outweighed by their prejudicial effect.

VII.

Officer Gore's testimony revealed that the police had received a letter from an anonymous source indicating that Mrs. Bounds may have been mistakenly murdered in place of another. We do not see that this would in any way tend to exculpate the defendant. Out of the presence of the jury, the court examined this letter. When Officer Gore took the stand, defense

counsel had the opportunity to question him about the letter. The state objected to the introduction of the letter as irrelevant and hearsay. The court offered to grant defendant a continuance to give time to investigate the contents of the letter. After a fifteen-minute break, defense counsel said he did not desire a continuance, nor did he want to question Officer Gore further.

The remedial procedure to be followed when such a discovery violation is made is the granting of continuance. Nixon v. State, 533 So. 2d 1078, 1090 (Miss. 1987); Cole v. State, 525 So. 2d at 367; Box v. State, 437 So. 2d 19 (Miss. 1983). The remedy for tardy disclosure of that to which a defendant is entitled to in pretrial discovery, under these circumstances, is a continuance. Moore v. State, 536 So. 2d 909, 911 (Miss. 1988).

The right to a continuance is not self-executing but defense must affirmatively request it on pain of waiver. Cole, 525 So. 2d at 368.

Berry was given the opportunity for a continuance and specifically refused it. We find Berry has waived this error.

VIII.

Berry requested, and the court refused, two lesser included offense instructions.

D-6

The chief difference between murder and manslaughter is the presence of deliberation and malice in murder and its absence in manslaughter.

D-7

The Court instructs the jury that if the jury can deduce from the facts and circumstances surrounding the case, either from the evidence or lack of evidence, any reasonable hypothesis consistent with the Defendant's guilt of a lesser offense than Capital Murder, then there is a reasonable doubt of his being guilty of Capital Murder, and the jury should return one of the following verdicts:

> We the jury, find the Defendant not guilty of Capital Murder, but we do find the Defendant guilty of Manslaughter, in which case the Court shall sentence him as provided by law.
>
> or
>
> We, the jury, find the Defendant not guilty of Capital Murder, but we do find the Defendant guilty of Aggravated Assault, in which case the Court shall sentence him as provided by law.

Berry contends that it was error for the court not to instruct the jury to consider a verdict of guilt of a non-capital offense, citing Hopper v. Evans, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) and Beck v. Alabama, 447 U.S. 625, 638, 100 S. Ct. 2382, 2390, 65 L. Ed. 2d 392, (1980). The rule is that a lesser included offense instruction should be given if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense. Cordova v. Lynaugh, 838 F.2d 764, 767 (5th Cir. 1988). The

unconstitutional denial of a lesser included offense instruction in a capital case can never be harmless error. Cordova, 838 F.2d at 767. The defendant may request a lesser offense instruction if the lesser offense arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment. Whitehurst v. State, 540 So. 2d 1319, 1327 (Miss. 1989); Gangl v. State, 539 So. 2d 132, 136 (Miss. 1989). Berry argues that manslaughter is a lesser offense in this case under Miss. Code Ann. § 97-3-27 (1972), and a reasonable hypothetical juror could have convicted Berry of manslaughter under the statute, if he failed to find Berry guilty of kidnapping Mary Bounds, but did find that Berry killed her without premeditation, citing Mease v. State, 539 So. 2d 1324 (Miss. 1989). Berry cites

Fairchild v. State, 459 So. 2d 793, 800 (Miss. 1984) for the proposition that in the context of a capital murder prosecution, a lesser offense instruction cannot be denied on grounds that a killing in the course of an underlying felony can only be capital murder, for this is equivalent to granting a directed verdict for the State on the underlying felony. Fairchild sets the evidentiary standard for denying the lesser offense instruction:

> Only if this Court can say, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence, and considering that the jury may not be required to believe any evidence offered by the State, that no hypothetical, reasonable jury could convict [the defendant] of [the lesser offense], can it be said that the refusal of a lesser-included offense instruction was proper.

Fairchild, 459 So. 2d at 801 (citing Ruffin v. State, 444 So. 2d 839, 840 (Miss. 1984)).

The instructions requested by Berry are identical to two of the instructions requested in Mease, 539 So. 2d at 1327 n.4, which this Court found not to "fit precisely the standard of Section 97-3-27." Mease, 539 So. 2d at 1334. In Mease, this Court applied the evidentiary standard laid out in Fairchild, quoted above, examining the evidence presented at trial as it related to the manslaughter statute. This approach is used here.

Miss. Code Ann. §97-3-27 reads:

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, except rape, burglary, arson, or robbery, or while such other is attempting to commit any felony besides such as are enumerated and excepted, shall be manslaughter.

Berry was indicted for murder under Miss. Code Ann. § 97-3-19 (2)(e) (Supp. 1989). The underlying felony was kidnapping which is not an excepted felony; therefore, Berry is not precluded from use of the manslaughter instruction.

Berry presents two possible scenarios under which the jury could have concluded that kidnapping was not proven beyond a reasonable doubt, neither of which is supported by the evidence. First, blood was found at Bound's automobile and her earrings were scattered, implying a struggle, at that point, negating the possibility that the jury could have doubted that Bounds was forced into Berry's vehicle. Second, Miss. Code Ann. § 97-3-19 (2)(e) (Supp. 1989) makes the killing in the attempt of kidnapping a capital murder. Therefore, had the jury found that Bounds was killed at her

vehicle in the attempted kidnapping, Berry could have still been convicted of capital murder.

In Beck, two possible crimes fit the facts, "capital robbery-intentional killing" or "felony murder". The death penalty was imposed on conviction of the former. The "intent" element necessary for imposition of the death penalty could not be supplied by the felony-murder doctrine. Under the statute the judge was specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense. Presumably, the jury could conclude that the elements of both were proven, with the exception of intent, and the only options would be to acquit or convict on the capital crime. This is not the case with Berry, or with the Mississippi statutes and case law. The

United States Supreme Court in Beck favorably cites Jackson v. State, 337 So. 2d 1242 (1976). Beck, 447 U.S. at 635, 100 S.Ct. at 2388-89, 65 L.Ed.2d at 401 n.10. This Court in Jackson struck down part of Mississippi's post-Furman death penalty statute which contained a similar prohibition on charging lesser included offenses, while warning that lesser included offense instructions should not be given indiscriminately or automatically, but when warranted by the evidence.

While Berry's statement indicates that he did not intentionally set out to murder Mary Bounds, the manner in which Mary Bounds was killed must be examined. We must determine whether -- taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inferences which may

be drawn in favor of the accused from the evidence -- a hypothetical reasonable jury could convict him of manslaughter.

The crime of manslaughter is defined as a killing without malice. Malice has been defined as:

> The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice. ... [M]alice is implied, and hence murder exists, whenever a death occurs as a result of some willful act by the accused under circumstances where he knows the act is likely to cause death or serious bodily injury.

Garrett v. State, 749 S.W.2d 784, 789 n.7 (Tex. Crim. App. 1986) (citing Banks v. State, 85 Tex. Crim. 165, 211 S.W. 217 (1919)).

> Malice in murder may also be shown by proof that, 'in the circumstances known to the defendant, a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'

Commonwealth v. Bray, 407 Mass. 296, 553 N.E.2d 538, 541 (1990).

Additional definitions include: "a malicious act is one intended to bring harm to another person." Shell v. State, 307 Md. 46, 512 A.2d 358, 368-69 (1986). "Malice is an intent to kill or to do grievous bodily injury, or to do an act which would usually cause death or great bodily harm where there is no justification, excuse or mitigation." Franklin v. State, 319 Md. 116, 571 A.2d 1208, 1209, (1990). "An intention to inflict injury on the victim which is not justified on any lawful ground or palliated by the existence of any mitigating circumstances is malicious within the meaning of the law." Commonwealth v. Matthews, 406 Mass. 380, 548 N.E.2d 843, 851 (1990). "Malice refers to various culpable mental states;

it encompasses the intent to kill or inflict great bodily harm, as well as wickedness of disposition, hardness of heart, and reckless disregard for social duty." Commonwealth v. Hart, 388 Pa. Super. 484, 565 A.2d 1212, 1217 (1989). "Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen." Black's Law Dictionary 862 (5th ed. 1979)

Dr. Ricky Hicks, pathologist, determined that the cause of Mary Bounds death was blunt trauma to the head. The injuries were consistent with injuries inflicted by hands and feet. In other words, Mary Bounds was beaten to death. We find that no reasonable hypothetical juror could find that this killing was without malice and Berry was not entitled

to the lesser included offense instruction.

IX.

The State introduced a plaster cast and photographs of footprints found near the body. Officer Gore testified that these were taken from the area in which the body was found. Deborah Haller, forensic toxicologist with the Mississippi Crime Lab, testified that the sample was insufficient to connect the defendant's shoes to the cast.

A trial judge has considerable discretion in determining the admissibility of evidence and unless that discretion is so abused as to be prejudicial to the accused, the judge's ruling will not be disturbed on appeal. Corley v. State, 536 So. 2d 1314, 1318 (Miss. 1988).

There is no dispute that the footprints were actually found at the scene of the crime, and the trial court did not abuse its discretion in admitting the footprint exhibits. Stokes v. State, 518 So. 2d 1224, 1227 (Miss. 1988) (pliers belonging to defendant admissible although no proof offered that these pliers were used to inflict injury); Shearer v. State, 423 So. 2d 824, 826 (Miss. 1983) (amount of blood so small that it could not even be identified as human); Miss. R. Evid. 401, 402 and 403.

We find no abuse of discretion in allowing the evidence of the shoe prints. Assuming, arguendo, the evidence should not have been admitted, we cannot see how the defendant was harmed. This assignment is without merit.

X.

Berry contends that the indictment charged him with intentional murder; that the indictment also assigned a maximum penalty of life; and that the jury instructions failed to include a charge that the murder was intentional. Therefore, he argues, the State failed to prove the crime for which Berry was indicted and this conviction must be reversed.

Berry concedes that Miss. Code Ann. § 97-3-19(2)(e) does not require intent, but contends that the State, by indicting for intentional murder, must be held to a higher standard of proof, citing Carter v. State, 650 S.W.2d 843, 846 (Tex. Ct. App. 1982). Berry cites Dorroh v. State, 229 Miss. 315, 90 So. 2d 653, 655 (1956) for the proposition that willfull is virtually the same as intentional.

Procedurally, Berry neither raised this issue in his motion to quash, nor in the hearing on that motion. Berry's motion to quash stated six grounds, none of which includes the issue raised on appeal. We find that Berry is procedurally barred from raising this issue on appeal.

Substantively, the indictment was sufficient to give the defendant fair notice of the crime charged. Bell v. State, 360 So. 2d 1206, 1208-09 (Miss. 1978). See also Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) (purpose of indictment is to provide description of charge which will enable accused to prepare defense; all that is required is a concise statement of the crime); Bullock v. State, 391 So. 2d 601, 606 (Miss. 1980) (indictment gives accused fair notice of the crime charged); Culberson v. State, 379 So. 2d 499 (Miss. 1979).

This assignment is without merit.

SENTENCING

XI.

After the jury had retired to consider whether Berry should be sentenced to death, a hearing was held on the habitual offender portion of Berry's indictment. The state offered proof of seven prior convictions: two escapes; two grand larceny, convictions; perjury; burglary; and simple assault on a law enforcement officer. The court found that the requirements of Miss. Code Ann.§ 99-19-81 were met and adjudged Berry an habitual criminal, ineligible for probation or parole. Shortly thereafter the jury returned from its deliberation and delivered the sentence of death, having never been informed that Berry could never be paroled, if given a life sentence.

We can see no reason why the jury should not be informed that "life" means, "life, without probation or parole." Indeed, we can see compelling reasons to require that the jury know this before sentencing a man to die. Consequently, in any case in which the imposition of the death penalty is possible, the habitual offender hearing should be held prior to jury deliberations on the death penalty. Here, any element of speculation or uncertainty as to Berry's status as an habitual criminal and whether he could be placed on probation or paroled was removed before the jury sentenced him to death. Mhoon v. State, 464 So. 2d 77 (Miss. 1985). The jury should have been informed on this point before considering its sentencing options. We find the reasoning of the Supreme Court of New Mexico in State v. Henderson, 109 N.M. 655, 789 P.2d

603, 606-07 (1990) on this issue to be compelling, and hereby adopt the following:

> We base our decision herein on the fundamental fairness, due process and eighth amendment rationales implicit in the decision in California v. Ramos, 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983) to the effect that the"' jury [must] have before it all possible relevant information about the individual defendant whose fate it must determine,'" id. at 1003, 103 S. Ct. at 3454 (quoting Jurek v. Texas, 428 U.S. 262, 276, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929 (1976)), and in McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L.Ed. 2d 262 (1987), to the effect that states cannot limit the sentencer's consideration of any relevant circumstance that could "cause it to decline to impose the death sentence." Id. at 304, 107 S.Ct. at 1773.

The "qualitative difference of death from all other punishments", Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L.Ed.2d 231, 239 (1985) (quoting California v. Ramos, 463 U.S. at 998-99, 103 S. Ct. at 3452), has resulted

in many limitations on the imposition of capital punishment which are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. Caldwell, 472 U.S. at 329, 105 S. Ct. at 2639, 86 L. Ed.2d at 239. Accurately informing the jury that the alternative to the death penalty is life, without benefit of probation or parole, can only enhance the sentencing process, insuring that excessive punishment shall not be inflicted. U.S. Const. amend. VIII, XIV; Miss. Const. art. 3 § 27.

On remand, the jury is to be informed that Berry has been adjudged an habitual criminal.

XII.

We address only those errors raised by Berry which are likely recur on remand.

A.

Berry argues that the aggravating circumstance, "previous conviction of a felony involving the use or threat of violence to the person" is invalid. The prosecution offered a certified copy of the judgment which was received as evidence without objection. The asserted reason for the invalidity is not that the underlying prior conviction was reversed or vacated, but that Berry was awarded damages in the amount of $15,000 as the result of a successful civil suit against the police officer who shot Berry. Despite these disturbing facts, the trial court cannot retry all prior convictions; thus, we have held the trial judge is not required to look beyond the prior conviction, valid on its face. Nixon v. State, 533 So. 2d at 1099.

B.

The aggravating circumstance instruction regarding an "especially heinous, atrocious or cruel" offense was presented for jury consideration without the limiting instruction, mandated in Coleman v. State, 378 So.2d 640 (Miss. 1979). Absent this limiting instruction the charge fails to adequately channel the jury's discretion. Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

On remand, the jury is to be given the limiting instruction. Further, if the question is again presented, the court may address anew the question of a change of venue.

AFFIRMED AS TO GUILT. REVERSED AND REMANDED FOR A SENTENCING TRIAL CONDUCTED IN ACCORDANCE WITH THIS OPINION.

DAN LEE, P.J., PRATHER, ROBERTSON, SULLIVAN, and ANDERSON, JJ., CONCUR. ROY NOBLE LEE, C.J., DISSENTS WITH SEPARATE

WRITTEN OPINION, JOINED BY PITTMAN, J. PITTMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY ROY NOBLE LEE, C.J. HAWKINS, P.J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-DP-199

EARL WESLEY BERRY

v.

STATE OF MISSISSIPPI

ROY NOBLE LEE, CHIEF JUSTICE, DISSENTING:

I do not agree that the lower court erred in its refusal to grant an instruction that appellant was an habitual offender and would never be eligible for parole. In my view, the majority opinion errs in reversing and remanding the case to the lower court for a new trial on the sentencing phase, Issue XI, for failure to

grant such an instruction. I adopt my dissenting opinion in Kevin Lewis Turner v. State of Mississippi, No. 03-DP-0082, handed down this day, December 13, 1990, (not yet reported), which case involves the same question.

In addition, Issue XII B relates to the aggravating circumstance instruction regarding an "especially heinous, atrocious or cruel" offense which was presented for jury consideration without the limiting instruction, set forth in Coleman v. State, 378 So. 2d 640 (Miss. 1979). In the recent case of Robert Lee Shell v. State, No. 89-7279, 111 S.Ct. 313 (1990), the United States Supreme Court held that the limiting instruction used to define "especially heinous, atrocious or cruel" aggravating factor for capital murder was unconstitutionally vague. In a per curiam decision, the Court said:

> The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. To the extent that the Mississippi Supreme Court, 554 So. 2d 887, relied on the "especially heinous, atrocious, or cruel" aggravating factor in affirming petitioner's death sentence, its decision is reversed. See Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), Although the trial court in this case used a limiting instruction to define the "especially heinous, atrocious, or cruel" factor, that instruction is not constitutionally sufficient. See Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1988); Cartwright v. Maynard, 822 F. 2d 1477, 1489-1491 (CA10 1987), aff'd, 486 U.S. 366, 108 S. Ct. 1853, 100 L. Ed 2d 372 (1988). The case is remanded to the Mississippi Supreme Court for further consideration in light of Clemons v. State, 494 S.S. _____ 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

The courts have such problems with the above instruction, I suggest that such aggravating circumstance not be used.

PITTMAN, J., JOINS THIS OPINION. HAWKINS, P.J., NOT PARTICIPATING.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 89-DP-199

EARL WESLEY BERRY

v.

STATE OF MISSISSIPPI

PITTMAN, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority's affirmance of the guilt of Earl Wesley Berry in murdering Mary Bounds.

I dissent from the majority's reversal of the sentencing of Earl Wesley Berry and in the remand for a new sentencing trial.

To reverse, the majority writes new law. The majority changes the rules and

procedures heretofore approved by this Court in such a way that the prosecution fails and the convicted murderer gets another chance at sentencing. The State is hard pressed to know what this Court will do; in this case the State followed what the Court had approved in the past and is reversed because the majority no longer supports that which the Court had approved in prior death penalty cases. The majority, in this case, and in many other criminal cases, exercises the luxury of second-guessing the trial court in the manner in which it conducts the habitual offender hearing. The majority second-guesses the trial court in that the majority, for the first time, requires that the jury be instructed that a life sentence would be life without parole according to § 99-19-81 of the Mississippi Code Annotated as it now exists. Should

not the majority further require the jury to be instructed that the governor still has the power to pardon? Should not the majority require that the jury be instructed that the legislature may also by new law provide for pardon.

Here the Court also second-guesses the defendant in that we require the trial court to give a jury instruction which the defendant did not request.

This was a heinous crime committed by a habitual offender and certainly the facts of this case do not create a situation that should initiate a change in law that is announced today by a majority of this Court. The change in law by the majority causes the trial court and the prosecution to fail because the majority changes its position on how a law may be employed by the lower court. The majority second-guesses and changes and picayunes the law

in the procedure of the trial court to the surprise of the State, to the benefit of the convicted murderer, and to the harm and danger of the law-abiding community.

There are times when the circumstances, the facts, and even the law, seem to be clear and settled and properly employed. It is at those times when all seems to be in accordance with what we have approved that this Court should not confuse, change, complicate or create new issues, new procedures, new rules and new interpretations. That which we have made plain in the past should continue to be plain in cases where there appears to be no doubt concerning guilt and where the instruction required by the majority concerning life without parole is an instruction that was not even requested by the defense. The uncomplicated should not be complicated, the unannounced should not

be announced, and the rightfully done should not be undone. I would affirm the sentence of the trial court.

ROY NOBLE LEE, C.J., CONCURS.